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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 508

LEWIS C. DOUGALL,

Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The trial court's memoranda are not reported but are found in the transcript of record (R. 16-17). The decision of the United States Court of Appeals for the Ninth Circuit is reported at 207 F. (2d) 843.

QUESTION PRESENTED

May an employee of a *bona fide* independent contractor maintain suit under the Federal Employers' Liability Act against a railroad to recover damages on account of personal injuries allegedly caused by the contractor's negligence?

STATEMENT OF THE CASE

On January 25, 1949, petitioner, a truck driver employed by Morrison-Knudsen Company, Inc. (hereinafter referred to as M-K) commenced an action in the United States District Court for the District of Oregon to recover over $340,000 damages for personal injuries sustained on January 30, 1946, near Goodnoe, Washington, while working on respondent's railroad right of way (R. 5, 33). Jurisdiction of the district court was invoked solely under and by virtue of the Federal Employers' Liability Act (hereinafter referred to as F.E.L.A.) (R. 4, 23).

The question of petitioner's right to maintain his action under the F.E.L.A. was segregated for separate trial without a jury, pursuant to the provisions of a pretrial order (R. 2-13). Certain facts were stipulated therein and a further stipulation of facts was filed at the time of trial (R. 3-6,14-15). At the trial, certain exhibits were introduced into evidence, including a long deposition of one of respondent's employees, as well as petitioner's deposition and photostatic copies of the original agreements between M-K and respondent (R. 38).

Thereafter, Mr. Stanton, respondent's Vice-President and General Manager, was examined at length by both parties (R. 39-75). The case was submitted to the court upon oral arguments and briefs.

In its Memorandum of Decision, dated May 24, 1952, the district court held that petitioner was precluded from maintaining suit under the F.E.L.A. by the rule of the *Norman* case (*Norman v. Spokane, Portland & Seattle Railway Company,* 101 F. Supp. 350 (D. C. Or.), aff'd per curiam, 192 F. (2d) 1020 (C. A. 9), cert. den. 342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 374 [copies of opinions printed in Petition, pp. 30-35]). However, upon petitioner's motion for rehearing, the court allowed his counsel to reopen the record and to introduce additional testimony and file further briefs. After again taking the case under advisement, the court filed its memorandum on the petition for rehearing, determining adversely to petitioner the two controverted issues set up in the pre-trial order under Issue I A (R. 17).

Thereafter, the district court entered comprehensive findings of fact and conclusions of law upon which judgment of dismissal was entered (R. 17-24, 28).

The findings and conclusions of the district court have been unanimously affirmed by the United States Court of Appeals for the Ninth Circuit (R. 99-105).

The following agreed issues of fact (R. 7-8) which determine the correctness of the judgment of dismissal have been adjudicated favorably to respondent by the two courts below:

1. Was plaintiff employed at the time and place of the accident by respondent, or by M-K?

2. Was M-K an independent contractor, or a vice-principal or agent of respondent, in performance of the work in question?

3. Was the contract between respondent and M-K entered into with the purpose or intent on the part of respondent to evade the F.E.L.A. by exempting itself from any liability to workmen performing said work, or was it made by the respondent for legitimate business reasons?

ARGUMENT

I. The Decision Below Is Clearly Correct.

A plaintiff who invokes the beneficial provisions of the Federal Employers' Liability Act must establish that at the time of the occurrence of the injury: (1) the defendant was a common carrier by railroad in interstate or foreign commerce, and (2) that he suffered injury while employed by the carrier in such commerce. It is fundamental that "* * * Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." (*Robinson v. Baltimore and Ohio Railroad Co.*, 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849; *Hull v. Philadelphia & R. Ry. Co.*, 252 U.S. 475, 40 S. Ct. 358, 64 L. Ed. 670; cf. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S. Ct. 1317, 93 L. Ed. 1692.)

In this case, the findings of fact, founded upon substantial evidence, establish that at the time of injury petitioner was employed by and working for M-K as a member of one of its construction crews, that he was acting under M-K's exclusive direction and control, and that M-K had the unrestrained power to and did direct the manner and method of doing the renovating and improvement work on respondent's right of way (R. 21-22). Consequently, not being an employee of respondent, petitioner cannot maintain this action under the F.E.L.A.

The stipulation between the parties and the findings further establish that M-K was in fact a true independent contractor acting under a *bona fide* contract, and that it was not the object of said contract, nor the purpose or intent of either of the contracting parties, to enable respondent to exempt itself from any liability created by the F.E.L.A. (R. 20). Accordingly, petitioner cannot contend that the contract, which is not included in the transcript of record filed in this Court (R. 94, 109), is void, as in violation of Section 5 of the F.E.L.A. (45 U.S.C.A., § 55).

The law in this case was settled adversely to petitioner's contentions in *Chicago, R. I. & P. R. Co. v. Bond,* 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735. There, the railroad entered into a contract with the plaintiff's intestate for the shoveling of coal on a per-ton basis. He was to remove all coal from cars into coal chutes in such amount and at such times as required by the company. He was also to break the coal into appropriate sizes, gather up coal that fell from the chute pockets to the ground, and place the same on cars or engines as

desired by the company. The railroad was to furnish the necessary tools for the job and to keep a record of all coal delivered. Payments were based on the amount of coal handled as determined by daily reports of cars unloaded by the decedent. He was required to submit a report and furnish a certification from each engine man, hostler or other employee showing the number of tons of coal delivered to any engine. This Court reversed a judgment in favor of the plaintiff in an action brought under the F.E.L.A. on the ground that under the contract the railroad had not retained the right to direct the manner in which the work was to be done nor to control the results to be accomplished. Therefore, decedent was an independent contractor, not entitled to the benefits of the F.E.L.A. This Court also rejected the contention that the contract was in violation of Section 5 of the F.E.L.A. and held that the decedent was not incompetent to assume the relationship of an independent contractor to the railroad.

Two other decisions of this Court, *Robinson v. Baltimore and Ohio Railroad Co.*, 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849, and *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 41 S. Ct. 93, 65 L. Ed. 205, reach a similar result. They hold that where a railroad contracts with another company for the furnishing of facilities, or services, or the performance of work necessary to the fulfillment of its own obligations to the public, the contractor's employees can not claim the benefits of the F.E.L.A.

The Courts of Appeal for the Third, Fourth, Sixth, Seventh and Ninth Circuits have applied the established rule of these cases in *Shaw v. Monessen Southwestern*

Ry. Co., 200 F. (2d) 841 (C. A. 3); *Norfolk & W. R. Co. v. Hall*, 57 F. (2d) 1004 (C. A. 4); *Latsko v. National Carloading Co. et al.*, 192 F. (2d) 1020 (C. A. 6); *Miles v. Pennsylvania R. Co.*, 182 F. (2d) 411 (C. A. 7); *Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651 (D. C. Cal.), aff'd 174 F. (2d) 1022 (C. A. 9); and *Norman v. Spokane, Portland and Seattle Ry. Co.* (supra). In a recent annotation appearing in the American Law Reports (30 A.L.R. (2d) 517), the *Norman* case is cited as a leading decision on the subject, *"Injured or killed person as employee of carrier or independent contractor, with respect to Federal Employers' Liability Act."*

In view of the fact that this Court declined to grant a petition for a writ of certiorari in the *Norman* case (342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 374), the present application made by the same counsel borders on the frivolous.

In the *Norman* case, an employee of Gilpin Construction Company sued respondent under the F.E.L.A. Gilpin had contracted with respondent to do repair and maintenance work on its trestles and bridges, and to furnish the equipment, tools and labor to do the work. The basic findings of fact were essentially similar to those at bar; i.e., that Gilpin controlled the manner and method of performing the work, and that the contractual arrangement was *bona fide* and was not a scheme to evade the F.E.L.A. The very same questions of law were raised and decided adversely to petitioner in the *Norman* case as are now framed as Specifications of Error 3 and 4 (Petition, p. 7); to wit: whether or not the railroad could delegate its duty to repair and main-

tain its track and roadbed, and whether or not the railroad could relinquish its right of control over such work, so as not to be liable under the F.E.L.A. to an independent contractor's employee injured in the course of the work. The Court will note that the Court of Appeals for the Ninth Circuit gave particular attention to petitioner's plea that it overrule its *per curiam* opinion in the *Norman* case (192 F. (2d) 1020), which affirmed Judge Fee's decision (101 F. Supp. 350). The Court of Appeals held (R. 103):

> "We are satisfied that that opinion correctly states the law. We adhere to it. That holding is in keeping with decisions of the Supreme Court."

II. There Is No Conflict of Decision.

In the interest of brevity, respondent will not undertake an extensive review of the authorities cited by petitioner (Pet. pp. 8-9). However, for the purpose of analysis, they may be grouped and classified on the basis of the following controlling distinctions:

(1) In *Kinzell v. Chicago M. & St. P. R. Co.*, 250 U.S. 130, 39 S. Ct. 142, 63 L. Ed. 893, the relationship of employer-employee was conceded;

(2) *Atlantic Coast Line R. Co. v. Treadway's Admx.*, 120 Va. 735, 93 S.E. 560 (S. Ct. App. Va.), as well as *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U.S. 18, 48 S. Ct. 241, 72 L. Ed. 453, *Cimorelli v. New York Central R. Co.*, 148 F. (2d) 575 (C. A. 6), *Roth v. Pennsylvania R. Co.*, 163 F. (2d) 710 (C. A. 6), and *Pennsylvania R. Co. v. Barlion*, 172 F. (2d) 710 (C. A. 6), involved the doctrine of "loaned servant";

(3) In *Western Boat Building Co. v. O'Leary*, 198 F. (2d) 409 (C. A. 9), and *Avondale Marine Ways v. Henderson*, 201 F. (2d) 437 (C. A. 5), decided under the Longshoremen's and Harbor Workers' Compensation Act, there was no question as to an employment relationship;

(4) *Hilliard v. Clifford*, 134 Wash. 590, 236 P. 108 (S. Ct. Wash.), and *Luby v. Industrial Insurance Company*, 112 Wash. 153, 191 P. 855 (S. Ct. Wash.), were decided under a section of the Workmen's Compensation Act of Washington long since amended;

(5) *Wabash R. R. Co. v. Finnegan*, 67 F. Supp. 94 (D. C. Mo.), was an action brought under the Carrier Taxing Act of 1937, which contains its own definition of "employee" (45 U.S.C.A. § 261(b) (d)), cf. *Nicholas v. Denver & Rio Grande Western R. Co.*, 195 F. (2d) 428 (C. A. 10);

(6) *Erie R. R. Co. v. Margue*, 23 F. (2d) 665 (C. A. 6), and *Downs v. Baltimore & Ohio R. Co.*, 102 N.E. (2d) 537 (App. Ct. Ill.), involved attempts by railroads to evade the liability of the F.E.L.A. by setting up as "independent contractors" mere straw men whose operations were controlled in great detail by the carriers;

(7) *Kulukundis v. Strand*, 202 F. (2d) 708 (C. A. 9) was an admiralty libel by a stevedore against a shipowner. It was not a Jones Act case, as petitioner states (Pet. p. 24);

(8) Finally, the court's holding in *Miles v. Pennsylvania R. Co.*, 182 F. (2d) 411 (C. A. 7), supports respondent, rather than petitioner.

CONCLUSION

It is quite obvious that the questions raised in this case are of no concern to the thousands of employees of interstate carriers who are covered by the F.E.L.A., for they are railroad men, not truck drivers, as was petitioner.

Petitioner argues that if the decision below is allowed to stand, railroads can avoid liability to their own employees under the F.E.L.A. by hiring financially worthless contractors to take over railroad operations, and then by transferring their employees to the payroll of the so-called "independent contractors."

If there were no other protection, Section 5 of the Federal Employers' Liability Act (45 U.C.S.A. § 55) would be an effective bar to any such scheme. It is therein provided that any contract, the purpose or intent of which is to enable any common carrier to exempt itself from any liability created by the Act, shall to that extent be void. However, in the case at bar, the courts below have found on substantial evidence that it was not the object of the contract between respondent and M-K, nor the intent of either of the contracting parties, to enable respondent to exempt itself from any liability created by the provisions of the F.E.L.A. (R. 20).

Respondent does not claim any immunity from suit by petitioner in a so-called "third-party action" to recover damages under principles of common law liability. However, the benefits of the F.E.L.A. are only available to respondent's own employees. On the other hand, petitioner, as an employee of M-K, has received and

will take further benefits under the Workmen's Compensation Act of the State of Washington, a remedy not available to respondent's crews employed in interstate commerce (see *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 279).

In view of the trial court's findings of fact and the stipulations between the parties, the decision below is clearly correct. No substantial question of federal statutory interpretation remains open on the record presented by petitioner. The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

CHARLES A. HART,
HUGH L. BIGGS,
CLEVELAND C. CORY,
Counsel for Respondent.